

Berg Product Design, Inc. and Warehouse, Mail Order, Office Technical and Professional Employees Union, Local 743, affiliated with International Brotherhood of Teamsters, AFL-CIO.
Case 13-CA-31690

April 28, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On December 16, 1994, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Berg Product Design, Inc., Wheeling, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ In adopting the judge's finding that Florentino Manzano was not shown to be a supervisor within the meaning of Sec. 2(11) of the Act at the time he was discharged, we rely on the judge's crediting of Manzano and his discrediting of Respondent witnesses Berg and Torrisi on any point as to which their testimony varied from that of Manzano. With respect to Manzano's authority to assign work, we note that on matters as to which employees needed any instructions, Manzano either obtained his priorities from orders given him from the office ("the papers in my hand") or consultations with Office Manager Torrisi. Hence, Manzano's reference to "special circumstances" in which he directed the work of employees does not prove the exercise of independent judgment within the meaning of Sec. 2(11). With respect to the assignment of overtime, we rely on Manzano's credited testimony that all employees in his department routinely stayed as late as necessary to complete job duties on weekdays and that on weekends he consulted Office Manager Torrisi regarding the assignment of overtime. Manzano's testimony regarding Torrisi's complaint to him about assigning too much overtime appears, in context, to amount to a complaint that he and his crew were not working fast enough. Hence, as Manzano testified, he promised her that he would "try to lessen the time and work harder."

Member Stephens would not find that Manzano's testimony concerning his conversation with Ruben Tapia about the signing of union cards established a coercive interrogation or the conveyance of an impression of management surveillance of his union activities in violation of Sec. 8(a)(1) of the Act.

Denise R. Jackson, Esq., for the General Counsel.
Anthony J. Crement, Esq. (Franczek, Sullivan, Mann, Crement, Hein, & Relias), of Chicago, Illinois, for the Respondent.

Jose L. Galvan, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 15 and 16, 1994. The charge was filed on April 26, 1993,¹ by the Charging Party, Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union). The Union filed an amended charge in this case on June 14. Upon the charge and the amended charge filed in this case, the Regional Director for the Board's Region 13 issued the complaint on July 28.

The complaint alleges that the Company, Berg Product Design, Inc. violated Section 8(a)(1) of the National Labor Relations Act (the Act), by interrogating employees about their union activities and by creating the impression among its employees that their union activities were under surveillance by the Company. The complaint further alleges that on or about April 23, the Company laid off employee Florentino Manzano and has failed to recall him because he engaged in union activity, and thereby violated Section 8(a)(3) and (1) of the Act. In a timely answer filed on August 3, the Company denied committing the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures plastic molded products, and produces molds at its facility in Wheeling, Illinois, where it annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Illinois. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Company admits and I find that the Union, Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Company employed Florentino Manzano from 1985 until it laid him off on April 23. At the time of his layoff, the Company employed Manzano at \$7 per hour, among five or six other individuals in the shipping and receiving department, at its Wheeling, Illinois facility. Prior to January, Manzano regularly worked from 11 a.m. to 7 p.m. and reported to William Cook, who was in charge of the shipping and receiving department.

In January, the Company's office manager, Doretta Torrisi, changed Manzano's hours to 7 a.m. to 7 p.m. Torrisi told

¹ All dates are in 1993, unless otherwise indicated.

Manzano that his hours were changed and that he, Manzano, was temporarily in charge of the shipping and receiving employees and the warehouse due to Cook's absence. The Company did not grant a wage increase to Manzano when it changed his hours and duties in January. From January until his layoff on April 23, Manzano reported to Office Manager Torrisi. In mid-January, at a company meeting of assembly and shipping and receiving employees, Torrisi announced that Manzano was in charge of shipping and receiving temporarily because of Cook's absence. During the following week, Torrisi, at a meeting of the same group of employees, warned that Manzano was in charge, and that if they did not listen to Manzano, "they were fired." At this same meeting, Torrisi urged the employees "to work as a team, work together and let's make a goal." At neither meeting did Torrisi give Manzano any opportunity to address the assemblage. Torrisi admitted that she called the second meeting because the shipping and receiving employees "were not listening to [Manzano]."

From January until April 23, Manzano played no part in Company personnel actions. He neither hired new employees nor interviewed prospective employees. Manzano was never involved in the permanent transfer of an employee from one department or job to another department or job.² If he needed additional help to complete a particular task in shipping and receiving, he asked Torrisi for it. Manzano never granted a pay raise to any employee. Nor was there any showing that he effectively recommended that the Company do so. Manzano had no authority to give time off from work to employees or to authorize vacations for employees. He had to refer both matters to Office Manager Torrisi. Manzano has never recommended that the Company discharge an employee.³ Nor has he disciplined or recommended disciplining

² General Manager Stanley Berg testified that Manzano had permanently transferred an employee from production to order picking at some time between January and April. Berg was unable to identify the employee, however, or specify when the transfer had occurred. Although he testified that the information was available, he did not offer to provide it. Elsewhere in his testimony, the general manager repeatedly answered that he did not know, when counsel for the General Counsel questioned him, regarding specifics of Manzano's authority during the 4 months ending on April 23. Yet Berg never offered to look at the Company's records or provide another source for this information, which the Company should have had at hand. I also noted that, at times, Berg was evasive in responding to questions from counsel for the General Counsel. In sum, Berg seemed unwilling to assist in making a full record on the matter of Manzano's status. As Manzano seemed to be exercising his memory to present as much information as resided there, in a frank and forthright manner, I have credited him where his testimony regarding his employment and union activity at the Company conflicted with, or was inconsistent with, that of Stanley Berg. Accordingly, I have credited Manzano's testimony that he did not have authority to transfer employees from one department or job to another.

³ According to Office Manager Torrisi, during his assignment as William Cook's temporary replacement, she authorized Manzano to discharge employees if they did not comply with Manzano's orders. Manzano's testimony neither corroborates nor denies this assertion. According to Manzano's credited testimony, Torrisi did not tell the shipping and receiving employees that Manzano had such authority. Instead, he testified that Torrisi warned the employees that they would be fired if they did not obey his orders. Thus, I gather from Manzano's testimony that someone in the Company's management, not Manzano, would impose such punishment if an employee dis-

an employee. Manzano has neither laid off any employee nor recommended that the Company lay off any employee.

The shipping and receiving department employees and Manzano completed each day's work before going home. If the department needed overtime to complete a day's work, Manzano and the shipping and receiving department employees continued to work beyond normal quitting time until they completed it. On these occasions, Manzano did not select employees for overtime. Manzano never sent an employee home for lack of work.

Torrisi assigned overtime work when some special need arose during the week. She discussed the need with Manzano. On Friday, Manzano would ask Torrisi if there would be weekend work. Sometimes, Torrisi would send him to another member of management, Don Marcheschi, for a decision as to whether there would be overtime and how many employees would be required. If two or three shipping and receiving employees were needed, Manzano would choose himself and one or two others. On other occasions, Torrisi would decide if Manzano and one other employee should come in and straighten out the warehouse. On one occasion between January and April 23, Torrisi complained that Manzano assigned too much overtime. Manzano told her that he would reduce the overtime and work harder.

Between January and Manzano's layoff on April 23, the Company held management meetings attended by General Manager Stanley Berg, Office Manager Doretta Torrisi, Don Marcheschi, and Dave Marcheschi. Manzano did not attend any of those meetings.

obeyed one of his orders. If I credited Torrisi, however, Manzano had the authority to administer that punishment on his own initiative.

The record casts serious doubt on the reliability of Torrisi's testimony regarding Manzano's authority. The General Counsel has shown that when his agents examined Manzano's personnel jacket, which Torrisi provided during the precomplaint investigation, the word "supervisor" did not appear on it. When the Company made the same personnel jacket available to the General Counsel at the hearing before me, however, Torrisi had inscribed "Supervisor" as the reason for raising Manzano's hourly wage from \$6 to \$7 in 1989. Prior to the addition of "Supervisor," the wage increase had appeared on the jacket without any explanation. Testifying before me, Torrisi admitted that she had made this change between the time of the investigation and the hearing in this case. But she offered no explanation for waiting about 4 years to write in "Supervisor" as the reason for Manzano's 1989 wage increase. The Company is claiming before me that Manzano was not entitled to the Act's protection. Torrisi's failure to explain the remarkable timing of her addition of "Supervisor" to his personnel file jacket suggests that she made this change on the possibility that it would be of some help to the Company at a hearing involving Manzano's layoff of April 23.

Torrisi's failure to present any business reason for waiting 4 years to write "Supervisor" on Manzano's personnel jacket caused me to have serious doubt as to the reliability of her testimony regarding Manzano's authority during the 4 months leading up to his layoff. I was also troubled by my impression that Torrisi was evasive when asked to identify the employees she spoke to about their failure to heed Manzano's instructions. As Manzano seemed to be giving his full recollection of the details of his employment and union activity at the Company in an objective manner, I have credited his testimony on those matters. When his testimony either contradicted or was inconsistent with Torrisi's, I have credited Manzano. Further, in view of her treatment of Manzano's personnel file jacket, I have not credited her testimony regarding Manzano's employment status unless he corroborated it.

From January to April 23, the five or six employees in shipping and receiving did not require much direction from Manzano in their daily work. They knew what they had to do. Only if there were something unusual would Manzano tell them what had to be done.

Manzano could change an employee's timecard if the employee had neglected to punch in or out, and if he knew the employee had worked. If Manzano did not know that the employee had worked, and the employee claimed that he or she had forgotten to punch in or out, Manzano was required to refer the question to Office Manager Torrisi.

Manzano's union activity began early in 1993, when he contacted the Union's field representative, Jose Galvan. Manzano asked Galvan if the Union would represent the Company's employees, who needed assistance to obtain vacations, insurance, and other benefits. The two arranged to meet.

Manzano and Galvan met at a restaurant on March 1. Manzano asked if the Union could represent the Company's employees. Galvan said yes, began explaining what the Union was, and asked how many employees worked with Manzano. Galvan showed an authorization card and said he would mail similar cards to Manzano. On the following day, Manzano received the cards.

Beginning on March 3, Manzano took the Union's authorization cards to work. He distributed a little over 60 of them to his coworkers until April 21. Manzano encouraged employees to support the Union, telling them that the Union would obtain salary increases and fringe benefits.

On March 15, the Union filed a representation petition with the Board's Region 13 seeking an election in a unit of the Company's production and maintenance employees, warehouse, shipping and receiving employees, at its Wheeling, Illinois plant. The Company received a copy of the petition in March.

Manzano also attended six union meetings. The first was at the Union's office, on March 20. Between five and nine company employees were present. Manzano notified the other company employees about the meeting, which lasted 45 minutes. Galvan and Lopez, another union representative, told the employees about the Union. The second and third union meetings were at the same office, under the leadership of Galvan and Lopez. Between 15 and 20 company employees attended the second meeting. Between 20 and 25 company employees were at the third meeting. At the second meeting, the union representatives suggested the need for more employee support. At the third, Galvan and Lopez said that the Company's owner had been notified of the Union's campaign. The two union representatives urged the employees to support each other. Manzano notified the company employees about the second and third meetings.

The Union held the remaining three meetings in a bus, parked at a plaza, 1 mile from the Company's Wheeling facility. They occurred on April 20, 22, and 23, respectively. Five to ten employees showed up at the meeting of April 20. Approximately 10 employees attended on April 22, and only 2 employees, Manzano and Calixto Espinal, were at the final meeting on April 23. Manzano notified the Company's employees about these meetings. On April 20 and 22, the Union's representatives, Galvan and Lopez, discussed the representation election which the Board was to conduct

among the Company's employees. The record did not disclose the content of the last meeting.

In April, prior to Manzano's layoff, Supervisor Rubin Tapia approached him and asked if Manzano knew who was promoting the Union and trying to bring it in. This conversation occurred as Tapia was leaving the Company's facility and Manzano was coming to work. Manzano said he did not know, but offered a union authorization card to Tapia for signature. Tapia refused the offer, because he had a good relationship with the Company's general manager, Stanley Berg. Tapia remarked that the employees he worked with might support Manzano, as they needed help. Tapia also said that someone had seen Manzano handing out union cards.

On April 23, at about 6:55 p.m., as Manzano was leaving, Don Marcheschi directed him to General Manager Berg's office. When Manzano arrived at his destination, Stanley Berg was there. He said that work was slow and that he was laying Manzano off. Manzano questioned the layoff, pointing out that shipping and receiving was very busy, and that there were other employees with less seniority. Berg replied that Manzano's wages were higher than those of the less senior employees, and asked if Manzano would work for \$4.50 per hour. Manzano said that he had three children to support and \$4.50 was insufficient for him. Berg recommended that Manzano seek a higher paying job elsewhere. Berg said he was sorry, but Manzano was laid off. Berg rejected Manzano's request for vacation pay. In this same discussion, Berg said he would pay an additional \$150 to Manzano for taking Cook's place. To date, the Company has not paid any additional money to Manzano for replacing Cook. However, Berg honored Manzano's request for a letter of recommendation.⁴

⁴ Stanley Berg testified that on April 23, he explained to Manzano that he, Berg, "was not happy with the way things were going, that the dock was a mess, that overtime was very high, that business was bad and that I was going to have to make certain changes. And that, even though he had been with the company a long time, clearly he was not able to act as a supervisor and run the department. I told him that he was familiar with the fact that the incoming orders were not rising, that the amount of work was declining and that I was going to have to do something to cut back. And that based on his job performance doing Cook's job, that I was going to let him go." The quoted account of Berg's remarks to Manzano omitted references to specific errors in treating three shipments, which Berg had included in his earlier testimony regarding the reasons he gave Manzano on April 23. This omission did not square with Berg's other testimony in which he asserted the seriousness of these errors. An omission of greater significance was any account in Berg's testimony of an effort to improve Manzano's performance by disciplining him or retraining him. Berg testified that from "mid-February through late April," he had "a continuing impression" that Manzano was not doing an adequate job. Yet, according to Berg's testimony, the only corrective action he took was to speak to Manzano an average of three times weekly. Absent from his testimony was any suggestion that he threatened to punish Manzano for performing inadequately. Berg did nothing to punish Manzano for his asserted shortcomings until April 23, 1 week before the Board-held election, and a few weeks after Manzano had offered a union card to a company supervisor.

According to Berg's own testimony he was "only nominally upset" when he talked to Manzano on April 2 or 3 about a mistake in handling a shipment of sippers. Berg, also testified that the second error, involving a shipment of bowls, resulted in his talking to Manzano in the presence of the customer. Further, according to

In his letter of recommendation for Manzano, Stanley Berg asserted that Manzano's association with the Company dated from 1985. Berg also wrote that Manzano had "always done the work assigned to him in an efficient manner" and that Manzano had "shown excellent qualities in terms of job comprehension & helped the Company in many ways." In conclusion the letter blamed "lack of orders" for the Company's inability to retain Manzano, and finally recommended him "highly."

The Board conducted a representation election among the Company's Wheeling employees on April 29 and 30. Manzano was a union observer on both dates. The Company has not offered to reinstate Manzano.

B. Analysis and Conclusions

The General Counsel urges findings that the Company violated Section 8(a)(1) of the Act by interrogating Manzano about union activity, and by creating an impression that his union activity was under surveillance. The General Counsel also contends that the Company laid Manzano off in reprisal for his union activity. The Company argues, initially, that Manzano was a supervisor and thus not entitled to the Act's protection. The Company further contends that even if he was not a supervisor, the General Counsel has not shown by a preponderance of the evidence that union activity motivated Berg to lay off Manzano.

The Board has consistently recognized that an employer may discharge a supervisor for union activity. E.g., *Daniel Construction Co.*, 244 NLRB 704, 719 (1979). In the instant case, the Company urges that Manzano was a supervisor at the time of his layoff, and thus not protected by the Act. The General Counsel disputes this contention. I find that Manzano was not a supervisor and thus was entitled to the Act's protection on April 23, when the Company laid him off.

In reaching my finding that Manzano was not a supervisor, I looked first to the Act for guidance. As defined in Section 2(11) of the Act, the term "supervisor" denotes:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

This section is to be read in the disjunctive; possession of any one of the enumerated powers establishes supervisory status. *Southern Indiana Gas & Electric Co. v. NLRB*, 657

Berg's testimony, the third incident provoked him to yell at Manzano. Again, none of these incidents motivated Berg to threaten layoff or any other punishment when he spoke to Manzano about them, prior to April 23. Finally, I note that the letter of recommendation, which Berg composed, praises Manzano's work and contains not the slightest suggestion that he was other than a valued employee. These circumstances, coupled with my impression that Manzano was the more frank and forthright of the two witnesses, convinced me to reject Berg's testimony and credit Manzano's regarding their confrontation on April 23. For the same reasons, I have credited Manzano's testimony that, prior to April 23, the Company neither disciplined him nor warned him about his work.

F.2d 878, 883 (7th Cir. 1981). Further, regardless of the specific supervisory power at issue, Section 2(11) of the Act requires that its exercise involve the use of independent judgment on behalf of the employer, and not in a routine or sporadic manner. *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 247–248 (6th Cir. 1983); *Juniper Industries*, 311 NLRB 109, 110 (1993). As the party contending that Manzano was a supervisor within the meaning of Section 2(11) of the Act, the Company bears the burden of proof on that issue. *We Can Inc.*, 315 NLRB 170 (1994).

The Company has not shown that Manzano was supervisor within the meaning of Section 2(11) of the Act. The record shows that Manzano worked in the Company's warehouse along with five or six employees. There has been no showing by credited evidence that Manzano had authority to hire, discharge, discipline, lay off, or to carry out any of the other functions set forth in Section 2(11) of the Act, using independent judgment. Nor has there been any showing that he effectively recommended any of the enumerated actions. Instead, the record shows that he oversaw the loading and unloading of trucks by employees who were acquainted with the work and routinely carried it out, with instructions from Manzano only when special circumstances required them. As a matter of routine, Manzano and his colleagues in the warehouse worked overtime to complete the day's assignments. Overtime for weekends and the need for additional employees in shipping and receiving were matters which Manzano had to take up with Torrisi, for decision. If a shipping and receiving employee needed time off for personal reasons, Manzano referred the request to Torrisi. In view of the foregoing, I find that the Company has not sustained its burden of showing that Manzano was a supervisor within the meaning of Section 2(11) of the Act, during the period from January until his layoff on April 23. *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992).

The General Counsel contends that the Company laid off Manzano because of his union activity. The Company denies that union activity had anything to do with its decision to lay off Manzano. Instead, the Company claims that economic reasons motivated its decision to lay him off on April 23. I find merit in the General Counsel's contention.

An employer violates Section 8(a)(3) and (1) of the Act by discharging or otherwise discriminating against employees for antiunion reasons. When the General Counsel has shown by a preponderance of the evidence that the employer's decision to take adverse action against the employee was motivated in some part by the employee's union activity, the employer will be found to have violated Section 8(a)(3) and (1) of the Act, unless the employer shows, as an affirmative defense, that it would have taken the same action, even in the absence of the employee's union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402–403 (1983), approving *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Accord: *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 190–191 (7th Cir. 1992). When the employer's explanation for its actions are pretextual—that is, if the reasons either did not exist or were not in fact relied upon—the employer has not met its burden and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Manzano began his union activity early in 1993 and pursued it even after his layoff on April 23. Indeed, among the Company's employees he was the one who contacted the Union and distributed authorization cards. He also encouraged fellow employees to support the Union. He attended all six union meetings and was the one who notified other company employees of those meetings. On April 29 and 30, Manzano was the Union's observer at the Board-held election.

General Manager Berg denied knowledge of Manzano's union activity at any time prior to the latter's layoff. The record suggests otherwise, however. Thus, in April, prior to Manzano's layoff, Supervisor Tapia singled him out and asked him if he knew who was promoting the Union and trying to bring it into the Company. I find that by this question Tapia was interrogating Manzano about his union activity and the union activity of other employees. By singling Manzano out for such interrogation, Tapia evidenced suspicion that Manzano was involved in the Union's campaign.

While he did not reveal his role in the Union's organizing campaign, Manzano left no doubt of his sentiment. He offered a union card to Supervisor Tapia, whose reaction showed understanding that Manzano was a union activist. Tapia suggested that Manzano would find support for the Union among the employees Tapia supervised.

In this same encounter, Tapia said that someone had seen Manzano handing out union cards. Given that Manzano was conducting his union activity in plain view of fellow employees, he would be likely to understand that the "someone," to whom Tapia referred, was a member of the Company's management. I find that by this remark, Tapia gave Manzano the impression that the Company was keeping Manzano's union activity under surveillance and thereby interfered with, restrained, and coerced him in violation of Section 8(a)(1) of the Act. I also find that by interrogating Manzano about his union activity in this context, Tapia again coerced him and thereby violated Section 8(a)(1) of the Act.

As a member of the Company's management, Tapia was likely to report his encounter to his superior, General Manager Stanley Berg. The Company's assertion in its posthearing brief that Tapia was assisting in the Union's campaign finds no support in the record. Indeed, when Manzano offered a union card to him, Supervisor Tapia declined because of his good relationship with Stanley Berg. I find it likely that this good relationship would have motivated Tapia to inform Stanley of Manzano's solicitation on the Union's behalf.

Tapia's encounter with Manzano, which included unlawful interrogation and giving the impression that someone in the Company's management was keeping an eye on Manzano's union activity, suggested that Tapia was acting on behalf of a management member, who was only seeking to confirm what he or she already suspected. These circumstances cast serious doubt upon Stanley Berg's denial that at the time of the layoff, April 23, he knew, or had been told, that Manzano was engaged in union activity. The timing of Berg's layoff of Manzano, only 6 days before the Board-held election was to begin, sheds further doubt on Berg's credibility in these regard. For such timing evidences an intent to use Manzano in a show of company hostility to discourage other employees from supporting the Union. These factors suggest that when he decided upon the layoff, Berg was in-

formed of Tapia's encounter with Manzano and at least suspected that Manzano was the leading employee supporter of the Union's organizing campaign among the Company's employees. I also find from the foregoing that the General Counsel has made a prima facie showing that Manzano's suspected leading role in the Union's organizing effort at the Company provoked General Manager Berg to lay him off on April 23.⁵

According to the Company's posthearing brief, Berg laid off Manzano for inadequate performance as a supervisor. This was not the explanation which Berg gave to Manzano at the time of the layoff, however. On April 23, Berg said he was laying Manzano off because work was slow. When Manzano questioned his selection for layoff, arguing that there was plenty of work in shipping and receiving and that there were other employees with less seniority who could be laid off, Berg said that Manzano's wages were higher than those of the less senior employees. Before me, however, Berg testified that one of the reasons he laid Manzano off was that Manzano was the highest priced employee, and that laying off the highest priced people is the way to cut wages. The Company did not present any payroll data showing that Manzano's wages were higher than those of less senior employees. The company records, which the General Counsel introduced into evidence, however, show that contrary to Berg's testimony, as of April 23, other company personnel were receiving higher wages than was Manzano. For example, employee John Kuciemba was receiving an hourly wage of \$8.50, Ruben Tapia's hourly wage was \$9, and Rafael Garcia's hourly wage was \$10.50. Yet only Manzano was laid off. From these circumstances, plus my evaluation of Berg's credibility in footnotes 4 and 5, above, I find that the Company has failed to show that Berg selected Manzano for layoff to save money.

Berg's attempt to show that he laid Manzano off to save money has fallen short of the mark. His resort to shifting and inconsistent explanations shows that he was grasping for an explanation to mask the real reason for his selection of Manzano for layoff. I find that Berg's economic excuse was a pretext. Accordingly, I find that the General Counsel has shown by a preponderance of the record evidence that the Company violated Section 8(a)(3) and (1) of the Act when Berg laid off Manzano on April 23 in reprisal for the latter's suspected leading role in the Union's organizing campaign.

That Berg asked Manzano if he would accept an hourly wage reduction from \$7 to \$4.50 does not rebut the General Counsel's showing of unlawful motive. For by singling Manzano out because of his union activity, to face either a layoff or a severe wage cut as an alternative, Berg was discriminating against him in violation of Section 8(a)(3) and

⁵ In response to a leading question asking whether anyone ever told him that Manzano was involved in union activity, Berg answered: "No, other than in the hearing yesterday." I have rejected that testimony, however, and have found it likely that Tapia quickly communicated with Berg about the union card incident involving Tapia and Manzano. In arriving at this finding, I have considered the circumstantial evidence which suggested that Berg's denial was unreliable, I also relied on my impression, discussed in fn. 4, above, that when testifying about his decision to lay off Manzano, Berg seemed to be grasping at reasons as he went along. In short, Berg did not impress me as being a frank and forthright witness when testifying about his motive for laying off Manzano.

(1) of the Act. When Manzano rejected the discriminatory low wage offer, he faced an immediate discriminatory layoff.

CONCLUSIONS OF LAW

1. By interrogating employee Florentino Manzano about his union activity and the union activity of other employees, and by creating the impression that Manzano's union activity was under surveillance, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By laying off Florentino Manzano because of his actual or suspected union activity, the Company violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company having discriminated against employee Florentino Manzano by laying him off and failing to recall him from layoff, the Company must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of a proper offer of reinstatement, less any net earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Company be required to remove from its files any reference to Manzano's layoff, which I have found violative of the Act, as set forth above, and notify Manzano that it has done so and that it will not use the layoff against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Berg Product Design, Inc., Wheeling, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, refusing to reinstate, or otherwise discriminating against any employee for supporting Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters, AFL-CIO or any other union.

(b) Coercively interrogating any employee about union support or union activities of other employees.

(c) Creating the impression among its employees that their union activities are under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Florentino Manzano immediate and full reinstatement to his former job or, if that job no longer exists, to a

⁶If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful layoff of Florentino Manzano and notify him in writing that this has been done and that the layoff will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Wheeling, Illinois, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743, affiliated with the International Brotherhood of Teamsters, AFL-CIO or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Florentino Manzano immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and

other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Florentino Manzano that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

BERG PRODUCT DESIGN, INC.